No. 99359-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CARL W. SCHWARTZ and SHERRY SCHWARTZ, individually and the marital community composed thereof,

Respondents,

v.

KING COUNTY, a local government entity and municipal corporation within the State of Washington,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Table of Authorities .....ii-iii

A. INTRODUCTION 1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT WHY REVIEW SHOULD BE DENIED.....6

(1) The Bollard at Issue Here Was Dangerous 7

(2) The County Did Not Warn Cyclists of Its Dangerous Bollard 8

(3) The Bollard Was a Latent Condition on the County's GRT.....10

D. CONCLUSION.....16

Appendix

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Camicia v. Howard S. Wright Const. Co., 179 Wn.2d 684, 317 P.3d 987 (2014).....6, 7, 8, 15
City of Oak Harbor v. St. Paul Mercury Ins. Co., 139 Wn. App. 68, 159 P.3d 422 (2007).....8
Cregan v. Fourth Member Church, 175 Wn.2d 279, 285 P.3d 860 (2012).....7
Cultee v. City of Tacoma, 95 Wn. App. 505, 977 P.2d 15, *review denied*, 139 Wn.2d 1005 (1999).....10
Davis v. State, 144 Wn.2d 612, 30 P.3d 460 (2001).....7
Gerlach v. Cove Apts., LLC, 196 Wn.2d 111, 471 P.3d 181 (2020).....6
In re Stranger Creek & Tributaries in Stevens County, 77 Wn.2d 649, 466 P.2d 508 (1970).....14
Jewels v. City of Bellingham, 183 Wn.2d 388, 353 P.3d 204 (2015).....10, 13
O'Neill v. City of Port Orchard, 194 Wn. App. 759, 375 P.3d 709 (2016), *review denied*, 187 Wn.2d 1003 (2017).....15
Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 108 P.3d 1220 (2005).....16
Ravenscroft v. Washington Water Power Co., 136 Wn.2d 911, 969 P.2d 75 (1998)..... *passim*
State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020) 6
Van Dinter v. City of Kennewick, 121 Wn.2d 38, 846 P.2d 522 (1993).....10
Wuthrich v. King Cty., 185 Wn.2d 19, 366 P.3d 926 (2016).....16

Federal Cases

Beckford v. United States, 950 F. Supp. 4 (D.D.C. 1997) 14
Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).....11

Other Cases

Abolofia v. Bd. of Supervisors of La. State Univ. & Agr. & Mech. Coll., 2015 WL 782831 (La. App. Jan. 27, 2015) 15

Statutes

RCW 4.24.210 .....1, 6, 16
RCW 4.24.210(4)(a) 7, 9

Codes, Rules and Regulations

RAP 4.2(a)(4).....6
RAP 13.4(b) 1, 10, 16

A. INTRODUCTION

Rather than accurately portray the facts and law in seeking review by this Court of Division II's decision in the recreational use immunity statute, RCW 4.24.210, King County ("County") resorts to the shoddy tactic of simply ignoring facts and pertinent decisions that detract from its narrative. It even belittles Carl W. Schwartz,[1] who was horrendously injured after crashing his bicycle into a single, unmarked 4-inch wide bollard that the County had negligently installed and maintained, in violation of state and federal safety standards and guidelines, on its Green River Trail ("GRT"), an urban commuter shared use path which is part of the County's Regional Trail System ("RTS").

Division II's opinion correctly applied the law on the immunity statute. Just as this Court denied direct review (Cause No. 96263-4) previously, this Court should deny review now where the County fails to meet the criteria of RAP 13.4(b) for review.

B. STATEMENT OF THE CASE

Division II's opinion does a good job in describing the facts in this

[1] The County facetiously speculates, without *any* authority, that Carl was injured because he was "inattentive" or distracted by a squirrel, pet. at 2-3, rather than its negligent placement of its bollard whose hazard to cyclists was known to the County. The County's speculation is *unsupported*, and insulting to Schwartz, an experienced bicyclist, rendered a quadriplegic by the County's negligence. As Division II noted, Schwartz rode several thousands of miles a year, and rode the GRT specifically. Op. at 2. If anyone, Schwartz would have detected the bollard had it not been so invisible to cyclists.

serious bicycle collision that occurred on the GRT near the Cecil Moses Memorial Park in Tukwila. Op. at 2-8. Schwartz does not seek to repeat those facts but certain critical points bear emphasis because the County chose to omit any reference to them.[2]

The bollard at issue was unmarked and had been installed by the County in the middle of the shared use bicycle path. CP 1162-66. That bollard was not located in a customary place where the path intersected with a road. It is not placed along a crosswalk or at an intersection with a roadway where a bicyclist would customarily expect to encounter a bollard. Rather, it is placed in the middle of the shard use path at a seemingly random location and is not easily anticipated by a cyclist using the curving path. *See, e.g.*, CP 1097-98.

The County failed to comply with state and federal standards concerning the bollard's installation and marking. *Id.* Such regulations require that bollards, like the one which injured Schwartz, be conspicuously marked. *Id*; op. at 4. This includes diamond shaped striping on the pavement to warn travelers, especially nonmotorized travelers like bicyclists who travel at speed, to avoid them. *Id.*; CP 183-87.

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[2] And the Court must view "the evidence and all reasonable inferences from the facts" in the light most favorable *to Schwartz*. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 919, 969 P.2d 75 (1998).

The County knew for *several years* that unmarked bollards, like the one which injured Schwartz, present a serious and life-threatening hazard to bicyclists along its trails because they are very difficult to see even while traveling at a reasonable speed. Numerous citizens complained that bollards on the RTS were dangerous; one citizen even reported "catastrophic injuries" as a result of hitting a bollard with her bicycle because the bollard blended in with the background. *See* CP 1943-44 (complaint in 2016 from a citizen who suffered "catastrophic injuries" after riding her bicycle into a "random bollard"[3] that had been installed on the Issaquah Creek Trail). The citizen warned that without sufficient markings, the bollard "blends in very closely with the asphalt surface of the trail." CP 1944; *see also,* CP 1972-87 (complaint in 2012 from a citizen warning about hazardous bollards on the RTS, specifically being able to see them or in time to avoid hitting them and referring to a Netherlands study showing that inadequately marked bollards are dangerous because they are difficult to see due to poor contrast with the surrounding environment); CP 2172 (warning from off duty firefighter that the bollards on the GRT are hazardous to cyclists); CP 1971 (complaint from cyclist who suffered injury after striking a bollard on the RTS). As one concerned citizen wrote when advocating that the County

[3] The randomness of the bollard at issue makes it especially dangerous.

remove bollards along RTS paths altogether, "When I weigh the rare danger of a car coming down the trail, and the daily danger of a bollard, I think I'd prefer the former rather than the latter." CP 1972.

The County was also previously informed by a professional traffic engineer, Martin Nizlek, that many of its bollards installed in the RTS were dangerous because they were inadequately marked and not visible in certain conditions. CP 1955-60.

More specifically, the County knew that the specific bollard that injured Schwartz presented a hazard to cyclists; it had been *warned*. Google Earth images showed that as early as 2009 a concerned citizen painted yellow or fluorescent warning markings on the pavement and wrote the word "POST" in all capitals on each side of the bollard to alert trail users of its existence. CP 1100-14.[4]

An experienced bicyclist would not have anticipated the bollard, which was placed not at an intersection or crosswalk where she/he would expect a bollard, but rather in the middle of the shared-use path at a

[4] Former Parks staffer Stephanie Johnson testified that she recalled working for the County when the painted warnings were still clearly visible on the path. CP 1115-18. Johnson confirmed that her supervisor, Sam Whitman, who is still employed by the County, did *nothing* about the warnings, even though she and another employee believed the warnings demonstrated that the bollard was a dangerous condition on the trail. *Id.* Although the County had installed hundreds of bollards on its trails, Johnson stated that this was the only bollard in the RTS that that had ever been marked with warnings by members of the public due to the particular hazard it imposed. *Id.* Why those markings were removed or allowed to fade is a mystery.

seemingly random location not easily anticipated by a cyclist using the curving path. *See, e.g.,* CP 1097-98.

Schwartz offered *unrebutted* expert testimony that the warnings demonstrated someone had likely hit the bollard and then felt the need to warn other trail users of its existence in the middle of the path. CP 1062-71, 1087-88. Schwartz's expert also stated that the photographs of the bollard clearly show that it had been hit or impacted on occasions prior to Schwartz's injury. CP 1079. Schwartz's experts testified that the bollard was functionally invisible.[5]

Aware of the danger its unmarked bollards posed, the County

[5] James S. Sobek, P.E. reviewed documents and pertinent safety standards and guidelines and conducted an on-site inspection of the GRT and the bollard. CP 1072-91. Sobek opined among other things that (1) the contrast or conspicuity of the bollard as measured against its background drops off considerably (to zero or near zero conspicuity) in weather and lighting conditions that are common in Washington (*e.g.,* rain, overcast skies, wet pavement); (2) when the conspicuity of the bollard drops to zero or near zero it will not be noticeable or readily apparent to someone approaching the bollard that doesn't know it exists; (3) when the County installed the bollard it did not comply with state and federal safety standards and recommendations (*e.g.,* MUTCD and AASHTO) concerning markings that would have made the bollard noticeable and readily apparent to trail users in the conditions that existed at the time of Schwartz's injury; (4) the bollard therefore constituted a known artificial dangerous latent condition on the trail under the conditions that existed at the time; and (5) the County knew, or should have known, that the bollard was dangerous because it received prior notice that the bollard presented an unreasonable risk of harm to trail users as evidenced in photographs of the site published by Google in 2009. *Id.*

Likewise, Schwartz's well-qualified human factors expert JoEllen Gill, MS, CHFP, CXLT, CSP, also opined that the single bollard was a latent condition caused by the lack of visual markers to make the bollard conspicuous against the trail's backdrop, and because a trail user does not expect to encounter this bollard in the location where it has been installed (in the middle of a trail with no intersections or other geographic warnings). CP 1062-71.

proposed adopting new safety guidelines in 2009 that would have required all bollards to be marked according to federal, national and WSDOT guidelines, with diamond shaped markings around the bollard. CP 1793-95, 1945-54. By the time Schwartz was catastrophically injured several years later, these proposed changes still had not been implemented by the County.

It is also important to note that the County has taken every opportunity to delay the expeditious resolution of this appeal. The County filed a baseless motion for reconsideration that was rejected by Division II. Most pointedly, it opposed direct review by this Court, claiming both that there are no inconsistencies in the decisions of this Court and that this case did not involve a fundamental and urgent issue of broad public import that this Court should address under RAP 4.2(a)(4). *See* County answer to statement of grounds for direct review.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED[6]

RCW 4.24.210 modifies common law principles of premises

[6] Schwartz does not ask this Court to grant review, but, if the Court grants review (and it should not), then this Court should also grant review on two issues Schwartz raised below and Division II addressed – whether the immunity statute apply here at all because the GRT was a transportation facility as in *Camicia v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 317 P.3d 987 (2014). Op. at 10-12; Br. of Appellant at 7-20, 23-24, 28-35; reply br. at 5-10, and the County lacked the authority to close the GRT. Op. at 12-15; Br. of Appellant at 20-21, 35-38; reply br. at 11-16. These issues are only *conditional* issues for review. *State v. Grott*, 195 Wn.2d 256, 265, 458 P.3d 750 (2020) (recognizing that issues may be raised conditionally); *Gerlach v. Cove Apts., LLC*, 196 Wn.2d 111, 119 n.4, 471 P.3d 181 (2020) (same).

liability where public or private landowners allow members of the public to use their land for free for purposes of outdoor recreation, barring liability for unintentional injuries to such users. *Camicia*, 179 Wn.2d at 694; *Davis v. State*, 144 Wn.2d 612, 615-16, 30 P.3d 460 (2001). Such landowners must show that the land at issue is (1) open to the public; (2) for recreational purposes; and (3) no fee "of any kind" is charged for its use. *Camicia*, 179 Wn.2d at 695-96.[7]

RCW 4.24.210(4)(a) creates an exception to recreational use immunity where a person is injured by "a known dangerous artificial latent condition" on the premises and no sign is "conspicuously posted" to warn of it. Here, the trial court erred in ruling as a matter of law that the bollard was not a latent condition where the other elements are met.

(1) The Bollard at Issue Here Was Dangerous

Although it *chose* not to argue that the dangerousness of its bollard,[8] the County now claims that Schwartz did not satisfy the

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[7] Because recreational use immunity is an affirmative defense, the County carried the burden of proving entitlement to immunity under the statute. *Cregan v. Fourth Member Church*, 175 Wn.2d 279, 283, 285 P.3d 860 (2012); *Camicia*, 179 Wn.2d at 693.

[8] At oral argument on summary judgment, the County *conceded* that all the elements except for latency were met.

> [COUNSEL FOR THE COUNTY]: There are, as I mentioned, exceptions to immunity under the statute; none of those exceptions apply on the record that's before this Court. There is the –

dangerousness element. Pet. at 12-14. This Court should see through this tactic. Division II correctly discerned that the bollard was indeed dangerous. Op. at 20-21.

Bollards *are* potentially dangerous. This Court need go no farther than its decision in *Camicia*, involving a bicyclist's collision with a bollard on a shared use path. As noted *supra*, cyclists colliding with bollards on the GRT were a hazard known to the County. Br. of Appellant at 3-6 (noting reports received by the County of "catastrophic injuries" suffered by bicyclists who hit bollards and numerous requests for additional warnings around the bollards on the County's trails). And cyclists painted a warning as to *this bollard* on the GRT because it was hazardous.

At least a question of fact was presented on this issue.

(2) <u>The County Did Not Warn Cyclists of Its Dangerous Bollard</u>

> [THE COURT]: Known, dangerous, artificial, latent.
>
> [COUNSEL FOR THE COUNTY]: Each of those terms modify the word "condition," they do not modify each other; and each of those terms must be present in order for a liability to attach to the landowner. *For purposes of our motion, we are prepared to concede the other elements; latency is the element that King County is not willing to concede*.

RP (8/3/18) at 9 (emphasis added). The County should not be permitted to argue on appeal a point it conceded below. *City of Oak Harbor v. St. Paul Mercury Ins. Co.*, 139 Wn. App. 68, 72, 159 P.3d 422 (2007).

With regard to the signage requirement of RCW 4.24.210(4)(a), it is *undisputed* that the County failed to warn GRT users about the bollard; *no sign was conspicuously posted about it.* Indeed, the County violated applicable signage standards, as noted *supra*. Moreover, in October 2008, Regional Trails Director Robert Foxworthy sought to fix the signage problem known to the County by asking County leaders, "Do we have the resources to paint road-like markings on regional trails – stencils, staff, painting equipment, etc.? We should begin thinking about painting diamond warning stripes around bollards on paved trails." CP 1950.[9] He was told the County had the resources to add warning markings, but *it chose not to do so*. *Id.* In 2009, the County went a step further and officially proposed new guidelines which would have required all bollards to be marked with diamond striping on the pavement according to national AASHTO and WSDOT guidelines. CP 1793-95, 1945-54. Yet, *eight years later*, the County had failed to mark the bollard that injured Schwartz.

Schwartz met the requirement of RCW 4.24.210(4)(a) that the bollard lacked a conspicuous warning sign.

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[9] Director Foxworthy continued to voice his frustration with the bollards on the RTS, writing in 2014, "I have a peeve about bollards in general. There must be a better way to keep vehicles off the regional trails (after all, it didn't stop the bus). We've got to figure out a better solution! Am I right? I spent about half my time pulling and replacing bollards!....[T]he paint is peeling off most of them." CP 2171

(3) The Bollard Was a Latent Condition on the County's GRT

The County asserts that Division II erroneously treated the question of the bollard's latent hazard to bicyclists. Pet. at 9-12. Division II correctly treated that issue. Op. at 21-23. Review is not merited. RAP 13.4(b).

Washington courts interpret the statutory terms at issue here in their plain and ordinary meaning, unless a contrary legislative intent is involved. *Ravenscroft*, 136 Wn.2d at 920. The words in RCW 4.24.210(4) modify "condition," not each other. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 46, 846 P.2d 522 (1993); *Jewels v. City of Bellingham*, 183 Wn.2d 388, 397, 353 P.3d 204 (2015).

For a condition to be "latent," it must not be "readily apparent" to the recreational user of the land. *Jewels*, 183 Wn.2d at 398. This "apparency" must be for the general class of reasonable users and does not mean the particular plaintiff. *Id.*[10] As for the condition, it is the actual condition itself and not the risk of harm that is at issue. *Ravenscroft*, 136 Wn.2d at 924-26. The issue is *visibility* to users, and, as Division II noted, this bollard was not visible to users, as Schwartz's experts opined. Op. at

[10] Thus, submerged trees in a man-made lake in *Ravenscroft* or muddy water on a road hiding an eroded edge and drop off into deep adjacent water in *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15, *review denied*, 139 Wn.2d 1005 (1999) met the requirement.

23. *Objectively*, a user could not see it at key times of day.[11]

The County simply ignores this Court's decision in *Ravenscroft*. There, this Court held that summary judgment was inappropriate on the issue of latency where a boater hit a submerged stump in the Spokane River. The plaintiff offered his own affidavit that the stumps were not visible to him as he rode in his boat, as well as affidavits from other persons declaring that boaters had hit the stumps in the past, thus showing their latent nature. 136 Wn.2d at 926. The Court held that the "question of whether this particular condition is latent is one of fact and, therefore, an order of summary judgment is not appropriate on that issue." *Id.* at 926.

Here, the bollard was not readily apparent to the general class of recreational users, as is evidenced by the 2009 Google Earth photos showing that a concerned citizen who presumably used the trail regularly,

[11] The County's reliance on *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), pet. at 11-12, does not help it. *Scott*, a federal qualified immunity case having nothing to do with recreational use immunity, merely stands for the general notion that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380 (plaintiff's testimony regarding a car chase did not match videotape). Here, Schwartz presented expert testimony that the bollard was invisible to people using the trail under normal conditions, not to mention the many warnings and improvised markings showing that normal trail users could not see it as marked. A reasonable juror could rely on that testimony and evidence. Merely because a video under certain conditions, at certain times, shows something is visible does not detract from Division II's sensible holding that a fact issue is present because users and experts testified that the unmarked bollard located at an unexpected place on the GRT was effectively *invisible* at times to the general class of trail users.

spray-painted warning markings around the bollard. Thus, *people actually using the GRT could not readily see the bollard*. The record also contains evidence from other users of the RTS, who warned that the County's inadequately marked bollards present a latent hazard to cyclists. *See* CP 1944 (cyclist who suffered catastrophic injuries warning of a bollard which "blends in very closely with the asphalt surface of the trail and the gravel along the side of the pathway"); CP 1972 (another cyclist relaying a study on the dangerousness of inadequately marked bollards and warning that the County "can't just put one lame little reflector on the bollard and think 'good enough'").

Furthermore, the *unrebutted* expert opinions of Sobek and Gill establish that the bollard was not readily apparent to normal trail users due to lack of expectancy and visual markers to make the bollard conspicuous, especially in conditions common to the Pacific Northwest (wet pavement and cloudy skies). Both experts opined that the bollard was an unforeseen, dangerous latent condition for trail users, and that this fact was compounded or made worse by King County's failure to comply with federal and state safety standards and recommendations that require conspicuous markings on and around the bollards to make them visible to

trail users in most, if not all, weather conditions. CP 1062-71, 1072-91.[12]

The trial court ignored these significant issues of fact and granted summary judgment largely relying on *Jewels*. In that case, this Court considered whether a water diverter running alongside a bicycle path was a latent condition. The Court analyzed three Court of Appeals cases and one Supreme Court case to "derive the…principle[]" that: "if an ordinary recreational user standing near the injury-causing condition could see it by observation, without the need to uncover or manipulate the surrounding area, the condition is obvious (not latent) as a matter of law." 183 Wn.2d at 400. In its 5-4 majority decision, the Court did not distinguish or even cite *Ravenscroft*.[13]

A recreational user standing (or treading water) next to the stumps in the Spokane River at issue in *Ravenscroft* could readily see them. *Id.* at 403 (Gordon McCloud, J., dissenting). It is only when traveling at speed that the condition becomes latent (or even hazardous for that matter). That is exactly the case here where Schwartz presented evidence from well-qualified experts who opined that the bollard was placed, painted, and left

[12] Those state and federal guidelines expressly acknowledge the latent danger inadequately marked bollards pose to regular users of bicycle trails; that is precisely why they require precautions like diamond-striped markings on the ground around bollards like the one which injured Schwartz. CP 1793-95, 1945-54.

[13] The County cites *Ravenscroft* only in passing, pet. at 14, but deliberately neglects to offer any analysis of it.

unmarked in a way that made it functionally *invisible* to bicyclists. Literally standing next to the bollard might have permitted observers to detect it, but that is little consolation for bicyclists invited by the County onto the trail and actually using it for its intended use and encountering a functionally invisible hazard under normal conditions for the trail's use. The bollard simply did not conform to relevant transportation safety standards, which require painted markings warning of such a hazard to prevent this exact type of harm. The County knew it was dangerous to cyclists traveling at speed because it was inadequately marked, yet it failed to take any action. Division II properly held that like the submerged stump in *Ravenscroft*,[14] a jury could find that it was not visible to a typical user of the land under typical conditions.

Further, contrary to the County's argument in its petition at 13-14, case law on the latency of bollards is not as one-sided as the County would have this Court believe. *See, e.g.*, *Beckford v. United States*, 950 F. Supp. 4, 8 (D.D.C. 1997) (finding that an inadequately marked bollard "in the middle of a pedestrian and bicycle path" was a negligently installed

[14] *Ravenscroft* has not been overruled, and this Court's precedent generally remains good law absent an express showing that it is "incorrect and harmful." *In re Stranger Creek & Tributaries in Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). *Ravenscroft* is not incorrect and harmful, especially as applied to this case where the County specifically invites bicyclists to use the GRT and benefits from their presence on the trail through increased federal funds and reduced traffic on its streets.

hazard); *Abolofia v. Bd. of Supervisors of La. State Univ. & Agr. & Mech. Coll.*, 2015 WL 782831 (La. App. Jan. 27, 2015) (reversing summary judgment dismissing claims of bicyclist who hit a bollard "in the middle of a bicycle path" due to "the risk of harm" or an "open and obvious danger"). Here, too, "highly factual" questions regarding the dangerousness of the bollard, a point conceded below, should have precluded summary judgment and allowed Schwartz his day in court, as Division II properly determined.

Moreover, Division II's opinion is good public policy. The County receives federal funding and relief from traffic congestion on its streets due to bicyclists using the land for transportation purposes. It owes a duty to protect these invitees and maintain bollards – *which it conceded are known artificial hazards* – in a reasonably safe condition for bicyclists invited to use the trail. *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 375 P.3d 709 (2016), *review denied*, 187 Wn.2d 1003 (2017) (cycling is a form of ordinary roadway travel and fact question was present as to whether City had notice of roadway defects). That duty is no different than the duty it owes to people using its roads, as the Court in *Camicia* recognized. 179 Wn.2d at 699 (describing the "common law duty to

maintain roadways in a condition reasonable safe for ordinary travel.").[15] That is precisely why state and federal guidelines mandate that bollards on pathways used for transportation be avoided or properly marked, with diamond pattern striping to warn nonmotorized travelers of their presence.

In sum, latency is a question of fact, and Schwartz presented ample evidence to defeat summary judgment and permit a jury to determine whether the bollard was a latent hazard, thus negating the application of the recreational use immunity statute. Division II got it right. Review is not merited. RAP 13.4(b).

D. CONCLUSION

Significant issues of fact should have precluded summary judgment as to whether RCW 4.24.210's recreational use immunity applies in this case, as Division II properly ruled. This Court should deny review. RAP 13.4(b).

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[15] As this Court has noted, the County has a "duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787-88, 108 P.3d 1220 (2005). "[A]s the danger becomes greater, the actor is required to exercise caution commensurate with it." *Id.* (quotation omitted). *See also*, *Wuthrich v. King Cty.*, 185 Wn.2d 19, 26, 366 P.3d 926 (2016) (municipality has duty to address inherently dangerous or misleading conditions in its roadways). Here, the bollard was an inherently dangerous and misleading condition, and the County knew this. As discussed above, the County knew from *multiple* complaints that bollard such as the one which injured Schwartz are misleading and hard to see for bicyclists. One of these reports detailed the great danger posed by these bollards, as the citizen reported "catastrophic injuries" and her goal to "never have anyone suffer what our family has had to go through." CP 1944. It should not escape liability for its careless inaction, especially where it actively invites bicyclists onto its trails knowing that these dangerous hazards exist.

DATED this 6th day of January, 2021.

Respectfully submitted,

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APPENDIX

RCW 4.24.210(4)(a)

Nothing in this section shall prevent the liability of a landowner or others in the lawful possession and control for injuries sustained to users by reason of a know dangerous artificial latent condition for which warning signs have not been conspicuously posted.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 99359-9 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 6, 2021, at Seattle, Washington.

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Comments:

Answer to Petition for Review

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

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